IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 27TH JULY 2006 / 5TH SRAVANA 1928

CRL.A.No. 2151 of 2003(C)

AGAINST THE JUDGEMENT/ORDER IN CRLP.475/2003
Dated 22/10/2003
CC.764/2001 of JUDL. MAGISTRATE OF FIRST CLASS COURT, KODUNGALLUR
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APPELLANT/COMPLAINANT:

ASOKAN, S/O KONNAKUTTY,
KALLAT HOUSE,THALIKULAM,CHAVAKKAD.

BY ADV. SRI. C. HARIKUMAR

RESPONDENTS: ACCUSED AND STATE:
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1. **SOBHANA, W/O. UNNIKRISHNAN**
   PUTHENKATTATH,NATTIKA,CHAVAKKAD.

2. **STATE OF KERALA REPRESENTED BY**
   PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY ADV. SRI.V.M.KRISHNAKUMAR
PUBLIC PROSECUTOR SMT. P.A. RAZIYA.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27/07/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. HEMA, J.

Crl. Appeal No. 2151 OF 2003

Dated this the 27th day of July, 2006.

J U D G M E N T

This appeal is by the complainant against the order of acquittal. The complainant filed a complaint against the first respondent, alleging offence under Section 138 of the Negotiable Instruments Act. After trial, the accused was acquitted on the ground that it is the duty of the complainant to prove that the account was live at the time of execution of the cheque. It was also held that it is the duty of the prosecution to establish that the cheque is dishonored for want of sufficient funds.

2. According to the complainant, Exhibit P1 cheque was drawn by the first respondent for the discharge of a debt due to the complainant. But the cheque for Rs. 60,000/- when presented to bank was dishonored with an endorsement "refer to drawer". The complainant came to know that there was no sufficient funds to honour the cheque, hence notice was issued to the accused. But no payment was made even thereafter, and hence after complying with the formalities, the complaint was filed.

3. PW1 was examined and Exhibits P1 to P8 were marked on the side of the prosecution. The accused did not adduce any evidence.

The accused denied the liability and contended that there was no transaction between the accused and the complainant. On analysis of the evidence in this case, the court found that Exhibit P7, the extract of the bank account relating to the accused, will show that the balance in the account was Rs. 54,490/- in 1998. But that was not sufficient to honour Exhibit P1 cheque. It cannot, however, be seen from Exhibit P7 that the account was live at the time of execution and presentation of the cheque.

4. Learned counsel appearing for the appellant contended that both grounds on which the accused was acquitted cannot be sustained. The first ground was that the complainant failed to prove that the account was live at the time of execution and presentation of the cheque. But, the appellant has no duty to establish that there was a live account at the time of execution of the cheque. What is relevant is whether the cheque was returned unpaid by the bank for want of sufficiency of funds. This will occur only when the cheque is presented to the bank.

5. Therefore, the finding that the complainant has a duty to prove that the account was live at the time of execution of the cheque can not be sustained. Even if there is no amount in the bank at the time of execution of the cheque, if there is sufficient fund to honour

the cheque at the time of presentation, no offence will lie against the accused. The crucial time at which the sufficiency of fund becomes relevant is the presentation of the cheque and not the date of execution of the cheque. The court below has therefore erred in finding that the complainant has a burden to prove that the account was live at the time of execution. The acquittal on this ground cannot be sustained.

6. The second ground on which the first respondent was acquitted is that the complainant failed to establish that there was insufficiency of fund in the account of the first respondent. Learned counsel appearing for the appellant contended that the appellant has established that there was insufficiency of fund. His case is that a specific contention was taken up in the complaint itself that there was no sufficient fund in the account. This fact was reiterated in the affidavit filed by the complainant. But, this fact is not challenged. Therefore, it is argued that the initial burden on the complainant is established.

7. I cannot agree with this argument. On going through the complaint and the evidence, it can be seen that the complainant only stated in the complaint and in the affidavit that he came to know on an enquiry that there is no sufficient fund. Such averment will not be

sufficient to establish the most relevant fact to be proved under Section 138 of the Negotiable Instruments Act. There will be documents also to establish this fact. The fact that the cheque was returned for insufficiency of fund is a matter to be established by the complainant by producing satisfactory evidence. The burden does not shift to the accused, in the peculiar circumstances.

8. A reading of Section 138 of the Negotiable Instruments Act shows that one of the ingredients of the Section is return of the cheque unpaid by the banker for want of sufficient fund. Only if the appellant establishes that the cheque on presentation was returned unpaid for the two reasons stated in Section 138 of the Negotiable Instruments Act, no offence will be made out. There is no presumption in favour of the appellant-complainant in respect of this fact. This is a factor which the court must be satisfied from the evidence and other materials. This fact is something which can be easily established by the complainant.

9. There will be records in the bank to prove this material fact and it may not be even necessary for the complainant to examine the Manager. The extracts from the ledger relating to the account will be admissible under the Banker's Book Evidence Act and will be more than sufficient to establish this fact. Therefore, the court need not

presume from the vague allegations in the complaint or in the evidence with respect to the most relevant ingredient of Section 138 of the Negotiable Instruments Act.

10. The complainant marked Exhibit P7, which is purported to be the extract of relevant entries in the ledger relating to the account of the accused. The entries there in show that there were transactions upto 31st August 1998. The last entry it is recorded as, "by tr. to P.B. Account". From these entries it may not be possible for the court to make any conclusion either way, without examination of any witness who is conversant with the facts. But no satisfactory evidence is produced before the court to prove that the accused had no sufficient fund in her account as on the date on which Exhibit P1 cheque was presented. Exhibit P1 cheque significantly does not show the number of the account. In such circumstances, unless there is satisfactory evidence to connect Exhibit P1 with Exhibit P7, no presumption or assumption can be made that the cheque was returned for want of sufficient funds.

11. Learned counsel appearing for the appellant cited a decision reported in ***Rajan*** **vs.** ***Sharafudheen*** **(2003(2)KLT 377)** to contend that the endorsement in dishonored memo "refer to drawer" was sufficient to infer that the dishonour was due to insufficiency of fund.

"It is by now trite that the expression "refer to drawer" is nothing but a courteous expression employed by the bank to convey insufficiency of funds. Averments in the complaint read along with the documents produced with the complaint and the sworn statement of the complainant recorded by the learned Magistrate can leave no doubt in any prudent mind that the allegation was specifically raised that the dishonor was on the ground of "refer to drawer" implying thereby that there was insufficiency of funds. Learned Magistrate was certainly in error in not reading the complaint reasonably and realistically".

12. I am not able to apply the said decision to the facts of this case for various reasons. Firstly, in my view no reliance can be placed on the dishonored memo, since the contents of the same are not admissible in evidence. By producing a dishonored memo along with the cheque, the complainant only proves that the cheque was returned to the complainant as unpaid by the Bank, but that will not further prove the reason for the dishonour. As long as nobody is examined from the bank to prove the dishonored memo, no reliance can be placed on the contents of Exhibit P2. The contents of Exhibit P2 cannot be taken into account for drawing any conclusion that there was insufficiency of fund in the account. I am not straining much to explain what the expression "refer to drawer" would mean. In this

context, I am not inclined to place any reliance upon the contents of Exhibit P2, since this cannot be admitted in evidence in the absence of proof in accordance with law.

13. The expression 'materials' referred to in Section 3 of the Evidence Act would mean legally admissible materials. The court cannot place any reliance upon the materials which are not legally admissible. Refer memo, Exhibit P2 is a document the contents of which can not be relied upon since it is not proved legally. In this context, it would be worthy to place reliance upon the decision reported in ***Pradeep Chandran*** **vs.** ***Nimmi*** **(1994 (1) KLT 144)**. On hearing both sides, I am satisfied that this is a fit case where an opportunity has to be given to the appellant to adduce further evidence regarding reason for dishonour viz. "insufficiency of fund".

14. Learned counsel appearing for the appellant argued that Exhibit P2, the dishonored memo, was more than sufficient to establish that there was no sufficient fund in the account at the time of presentation and that the cheque was dishonored for insufficiency of fund. I am unable to accept this argument. Exhibit P2 only shows that memo was issued from the Bank. It appears from Exhibit P2 that it is the memo issued from the Bank with an endorsement "refer to drawer". This document is not proved as required by law. No reliance

can be placed on the contents of this document to make any assumptions or presumptions that there was no sufficient fund in the account of the drawer at the time of presentation of the cheque.

15. Exhibit P2, the dishonored memo, does not come within the purview of any of the provisions contained in the Banker's Book Evidence Act. The mere production of the said document will not prove the truth of its contents. The court can only presume from this document about the contents. The specific reason for dishonour of the cheque is a fact which is to be proved by the complainant by placing satisfactory evidence. The mere production of the dishonored memo from the Bank will not be sufficient to discharge this burden.

In the result, the order under challenge is set aside. The court below is directed to consider the matter afresh giving an opportunity to both sides to adduce evidence on the relevant facts, as indicated in this judgment. Both sides are allowed to adduce evidence both orally and documentary on the relevant aspect.

The appeal is allowed.

K. HEMA, JUDGE

smp